1224 [redacted] 115
Supreme Court, U. S.
FILED
MAY [redacted] 1925
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

THE UNITED STATES,
Petitioner,
vs.
ONE FORD COUPE AUTOMOBILE, No. 4776501, ALABAMA LICENSE No. 10978, GARTH MOTOR COMPANY,
Claimant.

No._____

RESPONDENT'S BRIEF

WILLIAM S. PRITCHARD, Birmingham, Ala.,
Attorney for Respondent

Birmingham Publishing Co.—50—5-26-25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

THE UNITED STATES,
Petitioner,

vs.

ONE FORD COUPE AUTOMOBILE, No. 4776501, ALABAMA LICENSE No. 10978, GARTH MOTOR COMPANY,
Claimant.

No.----------

RESPONDENT'S BRIEF

THE PETITION OF THE UNITED STATES FOR WRIT OF CERTIORARI SHOULD BE DENIED

FACTS

The facts relied on by the Government are that one Killian had the automobile in question in his possession and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled, with the intent to defraud the United States of its internal revenue tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title un-

til the purchase price should be paid, of which, at the time the libel was filed, there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed, the sale was innocently made to another person. The District Court dismissed the libel.

LAW

Proposition One

Section 3450, Revised Statutes, is superceded by Section 26 of the National Prohibition Act, insofar as there is a conflict between the two.

National Prohibition Act (41 Statute 305).
United States vs. One Haynes Automobile (5 CCA, July 25, 1921), 274 Fed. Rep. 926.
One Big Six Studebaker Automobile vs. United States (9 CCA, May 28, 1923), 289 Fed. 256.
Holding of Circuit Court of Appeals for the 5th Circuit in instant case.

Proposition Two

The interest of an innocent third party in an automobile used in the illegal transportation or storage of prohibited liquor is not subject to forfeiture.

Jackson vs. United States (9 CCA Jan. 7, 1924) 295 Fed. Rep. 621.
Oakland Motor Co. vs. United States (9 CCA, Jan. 7, 1924), 295 Fed. Rep. 626.

Proposition Three

Since the enactment of the National Prohibition Act a suit cannot be maintained under Revised Statutes 3450

for forfeiture of a vehicle as having been used to remove and conceal distilled spirits, whereon a double tax (penalty) has been imposed upon the said Prohibition Act, with intent to defraud the United States of such tax.

Eighteenth Amendment to the Constitution of the United States.
Lipke vs. Lederer, 259 United States 557.
Regal Drug Corp. v. Wardell, Collector of Internal Revenue, 260 United States 386.
Yuginovich vs. United States, 256 United States 450.
United States vs. Stafoff, et als, 260 United States 477.
United States v. One Haynes Automobile (5th CCA. 7-25-21), 274 Fed. Rep. 926.
Fontenot, Collector of Internal Revenue, v. Accardo (5th CCA, 2-15-1922), 278 Fed. Rep. 871.
Lewis v. United States (6th CCA, 4-14-1922), 280 Fed. Rep. 5.
McDowell vs. United States (9th CCA, 2-5-1923), 286 Fed. Rep. 521.
One Ford Touring Car v. United States (8th CCA, 10-21-1922), 284 Fed. Rep. 826.
One Big Six Studebaker Automobile vs. U. S. (9th CCA, May 28, 1923), 289 Fed. 256.

PROPOSITION FOUR

Revised Statutes 3450, as to forfeiture of automobiles, was repealed by the National Prohibition Act.

National Prohibition Act (41 Statutes 305).
One Big Six Studebaker Automobile v. United States (9th CCA, May 28, 1923), 289 Fed. Rep. 256.
And Authorities Supra.

PROPOSITION FIVE

The matter involved herein is not a revenue law, invoked as such, but on the contrary is an effort on the part of the Government to confiscate certain personal property by way of punishment. Such statutes are always construed with the greatest strictness against the one seeking the forfeiture.

United States v. Loomis (9th CCA, March 28, 1924), 297 Fed. Rep. 359.

PROPOSITION SIX

There was no tax on illicit distilled spirits during August, 1923; wherefore, the automobile in question could not have been used for the purpose of depositing and concealing therein illicit distilled spirits with intent then and there to defraud the United States of taxes.

Authorities cited under Proposition Three.

PROPOSITION SEVEN

Sufficient facts are not alleged in the libel to warrant the relief therein prayed for; therefore, the motion to quash was correctly sustained.

See: Libel as set out in Transcript.

ARGUMENT

This cause was originally tried before the Honorable William I. Grubb, United States Judge for the Northern District of Alabama. The United States, feeling aggrieved at his decision in the premises, prosecuted an appeal to the United States Circuit Court of Appeals for

the Fifth Circuit. There, in an opinion in which all of the judges of that court concurred, Judge Grubb's decree was affirmed. It is well to here note that each of the courts in question had the benefit of substantially the same brief as is now filed by the petitioner in this court.

It cannot be denied that Section 3450 of Revised Statutes provides for the forfeiture of any vehicle used to remove or conceal any goods or commodities whereon a tax has been imposed, when such removal or concealment is with intent to defraud the United Staates of such tax or any part thereof. It was designed to aid in the collection of revenue, when the raising of a large revenue from the authorized manufacture and sale of intoxicants was a part of the financial policy of the Government.

Now, that is at the time the instant automobile was seized, and the libel in question sworn out, there could be no lawful manufacture, sale, or transportation of such liquor for beverage purposes. Nor liquor revenue stamps, or tax receipts could be purchased or used in advance of seizure. However, upon evidence of such illegal manufacture or sale a tax shall be assessed against the person responsible for such illegal manufacture or sale *in double the amount* as was then provided by law, with an additional penalty of $500.00 on retail dealers, and $1,000 on manufacturers.

In short, Section 26 of the Volstead Act provides that, whenever intoxicating liquors, transported or possessed illegally, are seized by an officer, he shall take possession of the vehicle, etc., and arrest the person in charge and proceed as provided in Section 26 against said person and vehicle. Section 35 repeals all prior provisions of law to the extent of their inconsistency, and no more. This court decided in the case of United States v. Yuginovich, 255 United States, 450, that this provision of the

To be argued by
DUANE R. DILLS,
Counsel.

Office Supreme Court,
FILED
DEC 1 192
WM. R. STANSB
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 115

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

ONE FORD COUPE AUTOMOBILE, NO. 4776501, ALABAMA LICENSE NO. 10978, GARTH MOTOR COMPANY, *Claimant.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. [redacted] 173

PORT GARDNER INVESTMENT COMPANY,

v.

THE UNITED STATES OF AMERICA.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief on Behalf of
Garth Motor Company, Claimant, in Case No. 473;
Port Gardner Investment Company, in Case No. 611.

DUANE R. DILLS,
Counsel.

WILLIAM S. PRITCHARD,
Birmingham, Ala.,
JOHN W. CREEKMUR,
Chicago, Ill.,
PHILLIP W. HABERMAN,
FRANK H. TOWSLEY,
New York City,
Of Counsel in Case No. 473.

LOREN GRINSTEAD,
WILLIAM T. LAUBE,
JAMES A. LAUGHLIN,
Seattle, Wash.,

THOMAS E. DAVIS,
Portland, Ore.,
Of Counsel in Case No. 611.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

AUTHORITIES.

3. CASES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 473.

THE UNITED STATES OF AMERICA, Petitioner,

v.

ONE FORD COUPE AUTOMOBILE, No. 4776501, ALABAMA LICENSE No. 10978, GARTH MOTOR COMPANY, Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 611.

PORT GARDNER INVESTMENT COMPANY,

v.

THE UNITED STATES OF AMERICA.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF

Garth Motor Company, Claimant, in Case No. 473;

Port Gardner Investment Company, in Case No. 611.

STATEMENT.

Case No. 473.

Garth Motor Company, Claimant.

This case comes before the United States Supreme Court upon writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit under Section 240

of the Judicial Code granted on June 1, 1925 by this court, on application by the Government.

On September 18, 1923, the Government filed a libel in the United States District Court for the Northern District of Alabama against one Ford Coupe Automobile, Motor No. 4776501, Alabama License No. 10978, for forfeiture under Section 3450 Revised Statutes, and attached to and made a part of the libel petition was a complaint charging one Ed. L. Killian, the user of the automobile, residing at 4110 Fifth Avenue, South Birmingham, Alabama, with possession on or about August 11, 1923, of 27 quarts of rye whiskey in said automobile **in violation of the National Prohibition Act (R. 4-5).**

The facts as stated in the opinion of the United States Circuit Court for the Fifth Circuit (reported in 4 Fed. (2nd) 528), are as follows:

> "The facts relied on by the Government are that one Killian had the automobile in his possession, and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled with the intent to defraud the United States of its Internal Revenue Tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title until the purchase price should be paid, of which at the time the libel was filed there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed the sale was innocently made to another person. The District Court dismissed the libel."

An appeal was taken by the Government to the United States Circuit Court of Appeals for the Fifth Circuit, and the order of the District Court in dismissing the libel was

affirmed February 27, 1925 (R. 14-17). Upon application by the Government a writ of certiorari was granted, bringing the case to this court.

Case No. 611.

Port Gardner Investment Company v. The United States of America.

This case comes before the Supreme Court upon certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions of propositions of law under Section 239 of the Judicial Code. The statement of facts and the propositions of law set forth in the certificate are as follows:

STATEMENT OF FACTS.

This action came to the Circuit Court of Appeals for the Ninth Circuit upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division, upon a decree in favor of the United States ordering a certain Jewett Sedan automobile forfeited.

On August 9, 1924, prohibition agents seized one Jewett Sedan automobile in Snohomish County, Washington, and within the jurisdiction of the District Court of the United States for the Western District of Washington, Northern Division. The automobile was being driven by one Luther L. Neadeau, who had purchased same under a conditional sales contract retaining title in the vendor. In the automobile was found a five gallon keg of illicit liquor, commonly known as "moonshine whiskey", on which no tax had been paid.

Neadeau was charged with possession and transportation of intoxicating liquors in violation of the National Prohibition Act, pleaded guilty to both charges and was sentenced to pay a fine (fol. 2). The Government sought to forfeit the automobile under Section 3450 of the United States Revised Statutes on the ground that the same was being used by said Neadeau in the removal and for the deposit and concealment of large quantities of distilled spirits, to wit, moonshine whiskey, with the intent to defraud the United States of the tax thereon. The plaintiff-in-error, assignee of the vendor and owner of the conditional sales contract and of all rights of the vendor in and to the automobile, intervened in the action, filed an answer and a claim to the automobile, and asked protection of its interest therein.

At the trial a stipulation was filed in which it was agreed that the plaintiff-in-error holds title to the automobile under a valid conditional sales contract, and that there remains unpaid a balance of seven hundred ninety-four and 08/100 Dollars ($794.08), and that neither plaintiff-in-error nor its assignor, the vendor of the car, had knowledge or notice prior to the time the car was seized that it was being used or was intended to be used in any illegal manner.

The driver of the car was not a manufacturer of the liquor and was not shown to be connected in any way with the manufacture of the same, but had purchased it along the public highway and had just arrived at his home with the same when he was arrested and the car seized.

In the State of Washington there is in effect what is commonly known as the "bone-dry law," making it unlawful for any person to have in his

possession intoxicating liquors, and the Government Agents testify that a permit will not be granted to anyone to manufacture or have in his possession such liquor in a "bone-dry" state such as the State of Washington, and that there is no place in the State of Washington where intoxicating liquor can be legally kept without the tax thereon being paid, and that there is no distillery warehouse, bonded warehouse or other place in the State of Wash-
(fol. 3) ington where intoxicating liquor can be legally kept either without the tax thereon having been paid or otherwise.

Questions Certified.

The questions of law concerning which the United States Circuit Court of Appeals for the Ninth Circuit desires instructions and advice of the United States Supreme Court are as follows:

1. Is Section 3450 of the Revised Statutes of the United States in force and effect in so far as it provides for the forfeiture of automobiles or other vehicles where the same are used or are being used for the transportation of intoxicating liquor?

2. Do the provisions of Section 3450 of the Revised Statutes of the United States authorize the forfeiture of the interest of a conditional vendor reserving title to a conveyance who is free from knowledge, blame or negligence in the premises where the goods or commodities concerned consist of intoxicating liquors illicitly manufactured or imported, a case under the Section referred to being made out in other respects.

3. Does Section 3450 of the Revised Statutes authorize the forfeiture of taxable goods or commodities and the carriage or other conveyance used

in the removal or for the deposit or concealment thereof where the only removal, deposit or concealment with intent to defraud the United States of such tax that can be shown is the mere movement of such goods on a trip other than from the original point of importation, manufacturing or bonded warehousing.

4. In the State of Washington, where there is no place where intoxicating liquor can be legally kept without the tax thereon being paid or otherwise, can an automobile be said to have been guilty of being used for the removal, deposit or concealment of intoxicating liquor with intent to defraud the Government of the tax imposed thereon where it is merely shown that the liquor is found in the automobile and that no tax thereon has been paid.

(fol. 4) 5. Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of that Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?

6. Is there any tax on intoxicating liquor illicitly manufactured as the word tax is meant and used in Section 3450 of the Revised Statutes of the United States or are the so-called taxes now claimed to be collectible merely penalties?

Preliminary Statement.

The cases now before this court are of great importance to the automobile industry, which according to the Bureau of the Census, Department of Commerce, is now the largest industry in the United States, and generally believed to be

the largest industry in the world. The development of this industry through the marketing of its product has been through commercial banking operations, now of great magnitude, carried on by finance and credit companies who finance the retail dealers in their sales to the ultimate purchasers, and in such financing conditional sale contracts, chattel mortgages and other security instruments are used. The use of these instruments in the automobile business did not originate with bootleggers in order to avoid liability under the National Prohibition Act, as the Government intimates in its brief in Case No. 473 (Garth Motor Company, Claimant), but rather they have made possible the remarkable development of the automobile industry. See article in October, 1925, The World's Work Magazine, page 575, and article on "Finance Companies", in January, 1923, Federal Reserve Bulletin and which bulletin says, "such finance companies are an intensified part of our commercial banking system". During the year 1924 there were manufactured and sold in the United States alone 3,243,285 automobiles, and during the year 1925 to November of this year there have been manufactured and sold in the United States over 4,000,000 automobiles, and it is assumed that at least 75% of these automobiles are sold upon time payment plans, in which the dealers reserve title or lien by use of conditional sales, chattel mortgages and other instruments. There are over 1,000 active finance and credit companies financing conditional sale contracts and other security instruments arising out of the sale of automobiles in this country, and employing in the same capital and borrowings in excess of two billion dollars ($2,000,000,000). These borrowings are from banks throughout the country and very largely upon the rediscount or trusteeing of such se-

curity instruments. In the National Association of Finance Companies there are 250 of such institutions, with combined capital and surplus employed in the financing of automobiles to an excess of $150,000,000. It is impossible for the automobile dealers and the finance and credit companies and the banks with which such security instruments are rediscounted to know at the time of the sale of an automobile that the automobile will not be used in violation of the National Prohibition Act. At the time of the enactment of Section 3450, such security instruments were scarcely known, and certainly were not the important and extensive medium of commerce that they are now. All of this Congress, it is safe to assume, had in mind when it enacted the salutary provisions of Section 26 of the National Prohibition Act, and intended its application to the forfeiture of automobiles in aid of prohibition. See United States *v.* One Buick Sedan (Cal.), 1 Fed. (2) 997, at 999.

While the Government, with its refinements and distinctions without a difference (See Lewis *v.* United States (C. C. A. 6), 280 Fed. 5) attempts to differentiate Section 3450 Revised Statutes from Section 26 of the National Prohibition Act, nevertheless it frankly admits in its brief, in Case No. 473 (Garth Motor Company, Claimant) that it seeks to use Section 3450 Revised Statutes as an aid and enforcement of the National Prohibition Act, and does not avail itself of Section 26 because of certain inconveniences and annoyances caused to it under that section. The difficulties now before this court are caused by the attempt of the Government to wrest Section 3450 out of its plain context, to accomplish what it now believes to be a good purpose, the enforcement of the National Prohibition Act. The reasonings and the arguments advanced by the Government, to say

the least, are not convincing, and deserve the remarks of the court in United States *v.* American Brewing Company (Pa. —2 Judges), 296 Fed. 772:

> "Resort to the expedient of having the enforcement officer who serves the warrant given an eleventh hour admission into the ranks of the Revenue Agents or adding to the affidavit which would support the warrant * * * another affidavit in the verbiage of the revenue statutes smacks too much of the proverbial grasping at straws and is too suggestive of the frantic scrambles of one who is lost in darkness and knows no way into the light."

Summary of Argument.

1. Section 3450 Revised Statutes, as applied to the facts in both instant cases, was repealed by the adoption of the National Prohibition Act, 41 Stat. 305 (United States *v.* Yuginovich, 256 U. S. 450, Lewis *v.* United States (C. C. A. 6), 280 Fed. 5) and was not re-enacted by Section 5 of the Supplemental Act of November 23, 1921, 42 Stat. 222, (sometimes referred to as the Willis Campbell Act), because Section 3450 is in direct conflict with the National Prohibition Act, and especially Section 26 thereof, as applied to the facts in the cases at bar. United States *v.* Stafoff, 260 U. S. 477, does not hold the contrary, because the questions now presented were not present in that case. (Commercial Credit Company *v.* United States (C. C. A. 6) 5 Fed. (2d) 1.)

There is a direct conflict because under Section 3450 the automobile is given a personality and made accountable for its own wrongs, and the rights of innocent parties in the automobile are forfeited, while under Section 26 of the

National Prohibition Act the automobile is not given a personality and is not in itself made accountable for the wrong, and the rights of innocent parties are protected.

There also is a direct conflict between the old revenue per gallon system of taxation under the Revised Statutes, in support of which Section 3450 was enacted, and the provisions of Section 35 of the National Prohibition Act, 41 Stat. 317, abolishing and forbidding as to illicit liquor all advance payments of taxes through stamps and receipts.

2. Even though Section 3450 were re-enacted, it would not be applicable to the automobiles in the cases at bar, because the users of the automobiles were not distillers and therefore were not defrauding or intending to defraud the Government of a tax since the taxes under Revised Statutes were *in personam* against the distiller and not *in rem* against the liquor. Furthermore the liquor was not removed, deposited or concealed within the meaning of Section 3450, but was transported and possessed within the meaning of Section 26 of the National Prohibition Act, 41 Stat. 315. Goldsmith-Grant Company *v.* United States, 254 U. S. 505, does not hold to the contrary because in that case a violation of Section 3450 was conceded and the only question was the effect on property rights of innocent parties.

3. Congress intended and made it mandatory that the provisions of the National Prohibition Act should be applied to the offenses in the instant cases. The Government cannot proceed against the offending person under the National Prohibition Act and against the offending automobile under Section 3450 for the same act. A conviction

of the person *ipso facto* causes a forfeiture of the rights of the convicted law violator in the automobile. Innocent lienors are protected whether or not the person has been convicted.

United States *v.* One Reo Truck (C. C. A. 2) not yet reported;
United States *v.* Torres (Md.), 291 Fed. 138;
United States *v.* One Ford Coupe (C. C. A. 5) 4 Fed. (2d) 528 (Case No. 473 at bar).

4. Since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, there is no tax upon illicitly made liquor or moonshine whiskey. There being no tax, there could be no intent to defraud of a tax, and Section 3450 is not applicable. (Commercial Credit Company *v.* United States, 5 Fed. (2d) 1.)

5. The former taxes, if any survive, became in fact penalties by the adoption of national prohibition. (Fontenot *v.* Accardo (C. C. A. 5) 278 Fed. 871.) This court has never hesitated to strip a penalty of its disguise as a tax and will not hesitate to do so when otherwise the effect will be to deny citizens the constitutional guaranties afforded by the Fifth Amendment to the Constitution. (Lipke *v.* Lederer, 259 U. S. 557.)

6. The Government's brief in Case No. 473, Garth Motor Company, Claimant, clearly shows an attempt to wrest an old statute (Section 3450 Revised Statutes) out of its plain context to fit a new delinquency for which the old statute was never designed and for which a new statute (National Prohibition Act) was designed. This is being

done in utter disregard of the rights of innocent parties and of the mandate of the new statute, and to the embarrassment of the automobile industry, the largest industry in the country. The only excuse offered by the Government is some inconveniences and annoyances caused to it by the procedure required under the new act. For a cure for such defects the Government should address its plea to the legislative and not to the judicial branch of government.

1.

SECTION 3450 WAS REPEALED AND WAS NOT RE-ENACTED.

Section 3450 Revised Statutes, as applied to the facts in both cases before this court, was repealed by the adoption of the National Prohibition Law, and was not re-enacted by Section 5 of the Supplemental Act of November 23, 1921, because Section 3450 is in direct conflict with the National Prohibition Law, and especially Section 26 thereof. United States v. Stafoff, 260 U. S. 477, does not hold the contrary.

Before the adoption of the Supplemental Act of November 23, 1921, Section 35 of the National Prohibition Act repealed all laws insofar as they concerned the production of intoxicating liquor for beverage purposes, inconsistent with the provisions of the National Prohibition Act, as was definitely settled by this court in United States *v.* Yuginovich, 256 U. S. 450. While Section 3450 was not specifically mentioned, it was nevertheless involved in the general principles of law laid down in the Yuginovich case, as is shown in the thorough and precise decision of the Circuit Court of Appeals for the Sixth Circuit, in Lewis *v.* United States, 280 Fed. 5, a case in which the facts arose before the adop-

tion of the Supplemental Act of 1921. In that case the court considers and analyzes all the arguments advanced and distinctions made by the Government in its brief in the Garth Motor case now before this court, and holds that the arguments prove too much and that the distinctions were without a difference, and that as they did not preserve Section 3257 and the other sections considered in the Yuginovich case, they cannot preserve Section 3450.

See also

United States *v.* One Haynes Automobile (C. C. A. 5), 274 Fed. 926;
Reed *v.* Thurmond (C. C. A. 4), 269 Fed. 252;
Farley *v.* United States (C. C. A. 9), 269 Fed. 721;
Ketchum *v.* United States (C. C. A. 8), 270 Fed. 416.

Admittedly, therefore, on the authority of the above cited cases, Section 3450 was repealed before the adoption of the Supplemental Act of 1921, and the question now remains whether the Supplemental Act re-enacted Section 3450 in the light of the decision of this court in United States *v.* Stafoff, 260 U. S. 477.

The decision in the Stafoff case does not hold that the Supplemental Act continued in force or re-enacted all of the laws concerning liquor in force when the National Prohibition Act was enacted. To have done so would have disregarded the mandate of Congress, which expressly failed to re-enact such laws as are in direct conflict with the National Prohibition Act. In Brooks *v.* United States, 260 U. S. 481, decided by this court at the same time as

United States *v.* Stafoff, the court expressly declined to determine whether the Supplemental Act re-enacted the Revenue Laws generally, and as stated by District Judge Thomas, in United States *v.* One Bay State Roadster (Conn.), 2 Fed. (2d) 616, at page 621 (a case cited in the brief of the Government in support of its contention that Section 3450 was re-enacted)—

> "In other words the Stafoff decision does not interpret the effect of the Supplemental Act of November 23, 1921, upon the seizures provided for in Section 3450, nor does it decide whether or not the National Prohibition Act sufficiently covers the situation with reference to seizures."

The specific points decided in the Stafoff case were that the National Prohibition Act had repealed, but the Supplemental Act of 1921 had revived those provisions of the Revised Statutes which made it criminal—

1. To carry on the business of rectifier, wholesaler or retailer of liquor for beverage purposes without having paid the special tax therefor.
2. Keeping a still for the production of beverage spirits without registering it with the Collector of Internal Revenue.
3. Carrying on the business of a distiller for beverage purposes without giving bond.
4. Making mash for the production of such spirits in an unauthorized distillery.

In the case of Commercial Credit Company *v.* United States (C. C. A. 6), 5 Fed. (2d) 1, at page 6, the court says:

> "It (meaning the Stafoff decision) considers only Revised Statutes 3242, 3258, 3281 and 3282 (Compiled Statutes 5965, 5994, 6021, 6022). These sections forbade carrying on a distilling or rectifying business except upon certain conditions precedent—paying special taxes, giving bond, and registering. The court found no 'direct conflict' between these sections and the National Prohibition Act. Obviously not. There is no 'direct conflict' between a provision prohibiting an act unless after condition performed, and the provisions prohibiting it entirely. There is substantial accord. There is only that inconsistency coming from the implied permission for one to do an act if willing to perform the condition. There is in the comparison of these sections a good illustration of that mere inconsistency which was enough to work repeal under Section 35, but not enough to be the 'direct conflict' of the Willis-Campbell Act."

In at least three circuits (including a decision of the Fifth Circuit, Case No. 473, Garth Motor Company, Claimant, now before this court) and in the Court of Appeals of the District of Columbia, it has been held that the question was not decided by the Stafoff case; that there is a direct conflict between Section 3450 Revised Statutes and the National Prohibition Act, particularly Section 26 thereof, and accordingly that Section 3450 was not reenacted by the Supplemental Act of 1921; and that it is still repealed under the general principles of law laid down in the Yuginovitch case.

> Commercial Credit Co. *v.* United States (C. C. A. 6), 5 Fed. (2d) 1;

United States of America *v.* One Reo Truck Automobile (C. C. A. 2), Decision of Circuit Judge Hand filed November , 1925, not yet reported, copies of which will be handed to the Supreme Court at the argument;

United States *v.* Milstone (C. A. D. C.), 6 Fed. (2d) 481;

United States *v.* One Ford Coupe Automobile, Garth Motor Company, Claimant (C. C. A. 5), 4 Fed. (2d) 528 (Case 473 at bar).

This "direct conflict" is immediately apparent when, as was held in Goldsmith-Grant Company *v.* United States, 254 U. S. 505, it is seen that Congress in the enactment of Section 3450 construed with other revenue provisions, "ascribed to the property a certain personality, the power of complicity and guilt in a wrong. In such cases there is some analogy to the law of *deodend*," and thereby the rights and interests of innocent parties are absolutely forfeited, while under the National Prohibition Act, Congress provided punishments and remedies under Section 26 thereof, based upon modern conceptions of justice, in that they carefully protected the title and right in the property of all innocent persons, and provided for the forfeiture of the interests in the property of the convicted law violator only, as a punishment to him. Clearly, therefore, Congress made no use of the analogy of the law of *deodend* in the National Prohibition Act, and did not intend that the automobile should be considered as having a personality or a power of complicity and guilt in the wrong, as it did under the provisions of Section 3450, and in this respect it must follow that the two pro-

visions are in direct conflict, and that Section 3450 was not re-enacted by the Supplemental Act of 1921.

> "With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections. Under either he loses everything he has in the vehicle. It is otherwise with reference to the good faith mortgagee or title holder. Section 3450 says his rights shall be forfeited; Section 26 says they shall not. Could inconsistency be more clearly 'conflict' or 'conflict' more surely 'direct'?"—Commercial Credit Co. *v.* United States, 5 Fed. (2d) at page 6.
>
> * * *
>
> "Unless observance is given to the distinction we have found, Section 26 is practically without force, for in every case of illegal transportation, the Government may proceed under Section 3450 and deprive the innocent owner of the right given him under Section 26. Certainly Congress did not intend such a result. Observance of this distinction between the two acts gives full force and effect to all other provisions, and to the evident intent of Congress."—United States *v.* Milstone, (Court of Appeals, D. C.) 6 Fed. (2d) 481, at page 483.

See also

> United States of America *v.* One Reo Truck (C. C. A. 2). Not yet reported.

Furthermore, there is a direct conflict between the two statutes [Act of Aug. 27, 1894, Sec. 48, 28 Stat. 563 and Sec. 35 National Prohibition Act 41 Stat. 317] with reference to the payment of taxes, as is clearly pointed out in the decision of the Sixth Circuit, in the Commercial Credit Company case, where the tax and penalty statutes

before and since the adoption of National Prohibition are examined with great care and concerning which the court concludes (5 Fed. (2) 1 at p. 5):

> "So far as we find, there was in the old revenue laws no way of paying any per-gallon tax except to pay it by revenue stamps 'in advance' of the act which would make the liquor available for use; but now comes section 35 and prohibits the issue of any revenue stamps or tax receipts in advance.
>
> Unless we have in some respect misapprehended the system, we cannot find that the mere transporter of moonshine is under a duty to pay a per-gallon tax, which duty would make the necessary basis for his intent to defraud; and we must regard the provision of section 35, abolishing and forbidding, as to illicit liquor, all advance payments through stamps and receipts, to be in 'direct conflict' with the old system of per-gallon taxation, and hence to repeal it *pro tanto*.
>
> We do not see that this liquor can be thought of as possibly produced for nonbeverage purposes, and hence still subject to taxation on that theory. The system of producing nonbeverage spirits is surrounded by careful safeguards; the law in that respect is to be enforced by the specified punishment for disregarding these safeguards, not by inference drawn from any fiction that illicit liquor is to be considered, for convenient purposes, as if lawful."

Other conflicts between the two statutes are: Under Section 3450 the liquor seized *must be disposed of* as the Secretary of the Treasury may direct, while under Section 26, Title II, National Prohibition Act, the *court must order the liquor destroyed;* under Section 3450 all forfeited boilers, stills and other vessels and tools, etc. must be sold

under the direction of the court, while under Section 18 of Title II of the National Prohibition Act it is unlawful to advertise or sell any such utensil, contrivance, machine, etc.

It is submitted that only by fanciful interpretations and unwarranted applications of decisions of this court to circumstances that were not before this court for determination in those decisions can forfeitures be made under Section 3450 of the automobiles in question. Injustice will result to innocent parties from such forfeitures and protection accorded them under Section 26, Title II, National Prohibition Act and under the Fifth Amendment to the Constitution will be of no avail. Since the Government has a complete remedy under the National Prohibition Act, surely this court will not unnecessarily stretch a harsh and drastic statute to cover a contingency for which it was never intended.

2.

SECTION 3450 IS NOT APPLICABLE IN THESE CASES.

Even though Section 3450 were re-enacted by the Supplemental Act of 1921 (which we deny), the automobiles in both of the cases before this court are not subject to forfeiture under its provisions. Goldsmith-Grant Company v. United States, 254 U. S. 505, does not hold to the contrary.

There are at least two elements which must be present to justify a forfeiture under Section 3450: (a) the liquor must be removed, deposited or concealed and (b) with intent to defraud the United States of a tax.

Many courts, because of the definitions of the words used in Section 3450, have held that statute not applicable

to an automobile used in transporting and possessing illicit liquor or narcotics.

> United States *v.* One Buick Automobile (S. D. Cal.) 300 Fed. 584;
> United States *v.* One Buick Sedan (S. D. Cal.) 1 Fed. (2d) 997;
> United States *v.* One 1920 Premier Automobile (C. C. A. 9) 297 Fed. 1007;
> United States *v.* Mangano (C. C. A. 8) 299 Fed. 492;
> United States *v.* One Studebaker (S. D. Tex.), 298 Fed. 191;
> United States *v.* One Kissel Touring (Ariz.), 289 Fed. 120 Affd. (C. C. A. 9th) 296 Fed. 688.

The reasoning of those courts was approvingly considered by the Circuit Court of Appeals of the Sixth Circuit in Commercial Credit Company *v.* United States, 5 Fed. (2d) 1, but that court considered that it was unable to follow those decisions to an independent conclusion because of the decision of this court in the Goldsmith-Grant Company case, and concerning which case the Circuit Court said:

> "So far as the opinion shows, the record did not indicate, any more than the present one does, that the persons transporting were distillers or in collusion with them. It is true that the argument that mere transportation by a later owner is not the removal of Section 3450 was not considered in the opinion, if indeed it was presented, and it is true for this reason the Supreme Court might well regard the question as not concluded by that opinion;

> but we think we must interpret it as obligatory upon us to its full apparent extent, and requiring us to answer in the affirmative the above stated first question."

The same Circuit Court in Cadillac Automobile *v.* United States (C. C. A. 6), 7 Fed. (2d) 102—Advance Sheets November 5, 1925, said:

> "However, in the Commercial Credit Company case we discussed the question whether transportation, in the way incident to ordinary ownership, and by a person who had originally been under no obligation to pay the tax, was the removal or concealment contemplated by Section 3450. The reasons involved indicated to us a negative answer; but we felt constrained to a contrary holding because of the holding, *sub silentio*, in the Goldsmith-Grant case, 254 U. S. 505."

In this respect the Circuit Court of Appeals of the Sixth Circuit erred.

In the Goldsmith-Grant Company case Mr. Justice McKenna recited the *agreed statement of facts* upon which the case was considered as follows:—

> "That the car was used by Thompson *in violation of* Section 3450 Revised Statutes, but that such use was without knowledge of the Company (See page 509)."

And in the records on appeal in that case, which arose before Prohibition, it was stipulated between counsel—

> "On October 15, 1918 said automobile was used by the said J. G. Thompson in the removal and for the deposit and concealment of 50 gallons of spirituous liquor, with the intent on the part of the

> said J. G. Thompson to defraud the United States of taxes thereon."

The offenses for which the penalties prescribed in Section 3450 was designed are admitted in the record in the Goldsmith-Grant case, but the contention was there made that the section was not applicable to an innocent lienor of the automobile. The only question, therefore, considered by this court was whether or not the provisions of that section being otherwise applicable extended to innocent owners and lienors.

In U. S. *v.* Mangano (C. C. A. 8), 299 Fed. 492, the court said:

> "The cases of Goldsmith-Grant Company *vs.* United States, 254 U. S. 505, Logan *vs.* United States, 260 Fed. 746, United States *vs.* Mincey, 254 Fed. 287, United States *vs.* Two Bay Mules, 36 Fed. 84, do not hold to the contrary. The question of the meaning of the term 'removal' was not involved in these cases, for it was conceded on the record in each case that there had been a removal of liquor with intent to defraud the United States of a tax thereon."

Accordingly the Sixth Circuit was not obliged, because of the Goldsmith-Grant Company case, to refrain from following the decisions holding that the section was not applicable to the mere user of the automobile.

The re-enactment of Section 3450 by the Supplemental Act (which we deny) would not make that section authority for the seizure of the automobiles in the instant cases. As stated by the District Court of Southern California in U. S. *v.* One Buick Sedan (S. D. Cal.), 1 Fed. (2) 997, at page 1000:

> "But all that was done by the Congress in passing the Willis-Campbell Act was to evince an intention to overcome the effect of decisions such as the McDowell case. In effect Section 3450 was re-enacted so that it remains now as it existed before the Volstead Act. Its purposes have not been changed. It is applicable and enforceable in the same manner and to the same extent as it was before being rendered ineffectual by the National Prohibition Act. It cannot now be given new and enlarged functions unless such are justified by its terms."

In order for Section 3450 to be applicable, the goods or commodities must be removed, deposited or concealed with intent to defraud the United States of the tax. The party therefore depositing, concealing or removing the untax paid for liquor must have been responsible for the tax and guilty of an intent to defraud the Government of it. The tax, however, referred to by that section was not a tax in *rem* upon the illicit liquor, but rather a tax *in personam* against the distiller of the liquor.

> Lewis *v.* United States, 280 Fed. 5.
> Commercial Credit Company *v.* United States, 5 Fed. (2) 1.
> United States *v.* Milstone, 6 Fed. (2) 481.
> United States *v.* One Buick Automobile, (D. C. Southern Cal.) 300 Fed. 584.

In the last case, at page 588, the court said, in passing upon this point:

> "In my judgment, without intending to announce a comprehensive schedule of categories, Section 3450 may be held to apply to (a) One actually concerned

> in some way in aiding in the manufacture of illicit liquor upon which a tax is due and unpaid, and who with intent to evade the payment of such tax removes the liquor from the place where the same was manufactured, or (b) one who, acting in some way in collusion with such a manufacturer by aiding or abetting in the removal or concealment of the liquor, may have been held to have been inspired with an intent * * *."

For an excellent discussion of the procedure followed and nature of the whole transaction—the manufacture, warehousing, bottling in bond, taxing, and withdrawal of liquors—see Taney *v.* Penn Bank, 232 U. S. 174 at p. 181.

The Government's brief in case No. 473, page 31, says that the court in reaching the conclusion, in the Commercial Credit Company case, that the tax is *in personam* failed to take into account the Act of March 3, 1897, Chapter 379 (29 Stat. 626), and that the reasoning of the case loses force when Section 600-a and Section 5 of the Willis-Campbell Act are taken into consideration. Section 600-a and Section 5 were most certainly considered at length by the court in that case, but apparently the Act of March 3, 1897 was not considered, because it is not in any way applicable. That statute, however, was considered at length by the same court in Skilken *v.* United States, (C. C. A. 6) 293 Fed. 923. It there specifically mentions and reaffirms the position it took in Lewis *v.* United States, that Section 3450 was repealed, but the same reasoning it holds cannot be applied to the Act of March 3, 1897 (29 Stat. 626) because there is nothing in the Volstead Act punishing the counterfeiting of Bottling in Bond Stamps, and therefore there is no inconsistency between the two statutes; and again the

same court held that Section 3268 was not repealed for a like reason. (See Bullock *v.* United States, (C. C. A. 6) 289 Fed. 29.) In the recent case of Commercial Credit Company *v.* United States, (C. C. A. 6) 5 Fed. (2) 1, the same court, in a case arising after the enactment of the Supplemental Act of 1921, again held Section 3450 repealed. The Act of March 3, 1897 (29 Stat. 626) merely provided that whenever any distilled spirits were deposited in a warehouse or a distillery, and had been duly entered for withdrawal upon payment of a tax, or for export under bond, and the required tax paid stamps or the export stamps had been affixed to the package, the distiller or owner of the liquor might move the spirits, provided he had declared his purpose so to do in the entry for withdrawal, to a separate portion of the warehouse where under Government supervision the spirits may be drawn off, bottled and packed, and every bottle when filled should have strip stamps affixed and be packed in cases, and then immediately removed from the distillery premises. The statute and Internal Revenue Regulation 60, Sec. 982, mentioned by the Government, must now relate to non-beverage liquor only. The statute, moreover, refers only to the acts done in the distillery and for that purpose treats the owner of the liquor as being in the same class with the distiller. By no reasoning or implication can the provisions of that statute extend beyond the acts done within the distillery, so as to include the subsequent transporter or purchaser of the liquor, and that statute can have no effect upon the reasonings nor decisions of the courts holding that the tax was only *in personam* upon the distiller and not *in rem* upon the liquor, and that therefore Section 3450 was not

applicable to the mere user or transporter of the beverage liquor. Furthermore, it does not affect the reasonings nor decisions of the courts holding that an automobile transporting and possessing intoxicating beverage liquor within the meaning of the National Prohibition Act is not synonymous with an automobile removing, concealing or depositing untax paid goods within the meaning of Section 3450. The words used in Section 3450 are strictly construed and limited to their precise meanings within that statute.

One of the most exhaustive treatments of the words used in Section 3450 and which was endorsed by the Ninth Circuit Court in United States *v.* One 1920 Premier Automobile, (C. C. A. 9) 297 Fed. at 1007, is to be found in United States *v.* One Ford Automobile Truck (Wash.), 286 Fed. 204, at 205, by Judge Cushman, where he says:

> "The question for consideration is: In which sense is the word 'removed' used in this statute? . . . . To determine this question it is appropriate, if not necessary, to examine statutes in *pari materia*. The words 'removed', 'removal', and 'removing' in a similar connection, appear to have been first used by Congress in the Act of March 3, 1791 (1 Stat. 199, at p. 203). This Act provides that the 'duties' on spirits shall be 'paid or secured previous to the removal thereof from the distilleries.' (Sec. 17). If paid 'previous to such removal', there was provision for abatement of duty of two cents for every ten gallons. Provision was made for a bond to secure payment upon all 'spirits as shall be removed from such distillery.' The casks were, 'previous to the removal of said spirits', required to be branded. Entries in books of the distiller were required to show 'all the spirits, distilled at such distillery, and

> removed from the same . . . . and the places to which removed (286 Fed. at p. 206) . . . .
>
> The foregoing statutes show that the word 'removed', as used in Section 14, has reference to removal from particular, specified places designated by law. These statutes clearly show the character of the places meant, and the fact that they were not again enumerated in Section 14 of the Act of July 13, 1866, probably arises out of the fact that it was a general section, meant to cover illegal removals from all the places mentioned in the several sections of the act (286 Fed. at p. 209)."

See also

United States *v.* One Buick, (Cal.) 300 Fed. 584, at 587

United States *v.* One Buick Sedan, (Cal). 1 Fed. (2d) 997

United States *v.* Mangano (C. C. A. 8), 299 Fed. 492.

Since it has not been and cannot be shown that the automobiles in the instant cases removed, deposited or concealed the untax paid for liquor within the meaning of the section, nor that the person in possession of the automobile was responsible for the tax, it follows that it cannot be said to have been so used with intent to defraud the United States, and is therefore not subject to forfeiture under Section 3450.

National Bond & Investment Co. *v.* U. S. (C. C. A. 7); not yet reported.

Bruno *v.* United States (C. C. A. 1) 289 Fed. 649.

And cases hereinbefore cited.

3.

ACTIONS MUST BE UNDER NATIONAL PROHIBITION ACT.

The National Prohibition Act makes it mandatory that seizures and forfeitures of automobiles used to illegally transport or possess intoxicating beverage liquor should be under its provisions.

Section 26 of Title II of the National Prohibition Act provides:

> "When * * * any officer of the law shall discover any person in the act of transporting in violation of law, intoxicating liquors in any * * * automobile * * *, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or *possessed illegally* shall be seized by an officer he shall take possession * * * of the automobile * * * and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; * * * The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale shall pay all liens, according to their priorities, which are established, by intervention or otherwise * * *"

The provisions of that section are specific and mandatory, and require—

(a) That the officer upon seizing the intoxicating liquor transported or illegally possessed shall—

1. Take possession of the automobile.

2. Arrest the person in charge thereof.

3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) The court, upon conviction of the person, shall—

1. Order the liquor destroyed.

2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) The officer carrying out the execution of the court shall—

1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which shall be established by intervention or otherwise; and further that all liens against the property sold shall be transferred from the property to the proceeds of sale.

The re-enacting clause of Section 5 of the Supplemental Act provides:

> "but if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

Once a person is charged with a violation of the National Prohibition Act, or an officer finds the liquor being transported or possessed by a person in the automobile, the pro-

cedure against both the person and the vehicle must be under the provisions of the National Prohibition Act, and if the person is convicted under the provisions of that act, there is ipso facto a conviction or a forfeiture of the automobile insofar as the convicted law violator's interests are concerned.

In United States *v.* Torres, (Md.) 291 Fed. 138, the court says:

> "The person and the vehicle were convicted at one and the same time under Section 26. The plea of guilty of Torres established the guilt of the car. In other words, there has already been, as respects the automobile, a conviction for the offense under the National Prohibition Act, and such conviction is a bar to prosecution under Revised Statutes 3450."

See also—

> The Spray (R. I.) 6 Fed. (2) 414.
>
> United States *vs.* One Ford Automobile, Commercial Credit Company, Intervener, District Court of Tennessee. Not yet reported.

It follows as a matter of logic that where the rights of innocent parties must be determined under the National Prohibition Act if the law violator has been convicted, equally must they be protected under the provisions of that act where the law violator has escaped or where he has been acquitted. As was said in the case of United States *v.* One Reo Truck (C. C. A. 2), not yet reported:

> "Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force as against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it pos-

> sible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the bona fide lienor to a penalty from which he would be exempt in case of conviction."

This court, in the case of Coffey *vs.* United States, 116 U. S. 436, at page 443, has said:

> "It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*"

The facts in the two cases before this court were, in the certified case, No. 611, Port Gardner Investment Company *v.* United States, that the conditional vendee of the automobile, who was charged with possession and transportation of intoxicating liquors in violation of the National Prohibition Act, pleaded guilty to both charges, and was sen-

tenced to a fine; and in case No. 473, United States *v.* One Ford Coupe, Garth Motor Company, Claimant, a libel, according to the decision of the Circuit Court, was filed against the automobile for forfeiture under Section 3450. Reference to the complaint in connection with that libel shows that one R. A. Smith, Prohibition Agent, charged Ed. Killian with violation of the National Prohibition Act as follows:

> "That at said time and place aforesaid said defendant herein named unlawfully did knowingly have in possession for intoxicating beverage purposes, certain intoxicating liquor, to wit, twenty-seven quarts of rye whiskey, of . . . then and there contained in twenty-seven quart bottles, otherwise than as authorized by the National Prohibition Act."

In other words, the person in charge of the automobile in the case in which the Garth Motor Company is the claimant was also charged with violation of the National Prohibition Act. We submit that according to the authorities and the arguments herein advanced, that in the Port Gardner Investment Company case the conviction of Nordeau under the National Prohibition Act *ipso facto* worked the forfeiture of the automobile under that Act, insofar as his interests were concerned, and it was mandatory upon the court to have the automobile sold, as provided in that Act, due regard being given to the liens and interests of innocent parties; that in Case No. 473, Garth Motor Company, Claimant, when complaint was made against Killian for violation of the National Prohibition Act, it became mandatory upon the officer to proceed against Killian and the automobile in accordance with the provisions of the National Prohibition Act and that recourse could not be had to Section 3450.

4.

THERE IS NO TAX ON ILLICIT LIQUOR.

Since the enactment of the National Prohibition Act there is no tax (as that term has been defined by this court) upon illicitly made liquor or moonshine whiskey. There being no tax, there could be no intent to defraud the payment of a tax within the meaning of Section 3450.

The Government in its brief in Case No. 473, Garth Motor Company, Claimant, argues at length that there is a present tax on illegally manufactured liquor, and therefore the automobile upon which the untax paid liquor was found was subject to forfeiture under Section 3450. The Government passes over a very exhaustive and learned discussion of this subject by the Sixth Circuit Court of Appeals in Commercial Credit Company *v.* United States, 5 Fed. (2) 1, at page 4, where it says:

> "When we inquire about a tax, the first thought is 'What tax?' In some of the cases it has been said that the tax authorized by section 35, tit. 2, of the National Prohibition Act (Comp. St. Ann. Supp. 1923, §10138½v), answered this question; but, passing the difficulty of finding an intent to defraud the Government of a tax which does not yet exist, and the doubt whether this section has any reference to a per-gallon tax, it has been authoritatively held (Lipke *v.* Lederer, 259 U. S. 557, 561, 42 S. Ct. 549, 66 L. Ed. 1061) that the assessment which may be made under this section is not one of a tax, but of a penalty for law violation. So it must be quite clear that the requirement of section 3450 that there shall be an intent to defraud 'of a tax' cannot be satisfied by finding no tax but only a penalty. R. S. §3296

(Comp. St. §6038), is in the same situation. It does not provide a precedent tax out of which one may intend to defraud the government; it provides a penalty to be assessed as punishment for wrongdoing.

"Apparently, previous statutes, like R. S. §3251 (Comp. St. §5985), were superseded by section 48 of the Act of August 27, 1894, (Comp. St. §5986); whether the lien and personal liability clauses of 3251 would survive is here immaterial. The Act of 1894 adopts and makes applicable the existing provisions of law for the payment of taxes by the use of stamps. This act levied a tax of $1.10 on each proof gallon; we do not find that it contemplated or permitted any means of collection, or payment, save through the system of selling of tax-paid stamps by the collector. It provided for payment by the distiller before removal. This statute in turn was partially superseded by section 600(a) of the Revenue Act of 1918 (40 Stats. 1105 [Comp. St. Ann. Supp. 1919, §5986e]). This provides that in lieu of all other internal revenue taxes 'there shall be levied and collected on all distilled spirits * * * that may be hereafter produced in * * * the United States * * * a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law."

"When this act was passed, the manufacture of whisky for beverage purposes or its withdrawal from bond for such purposes was lawful, except as temporarily suspended by the War Prohibition Act (Comp. St. Ann. Supp. 1919, §§3115 11/12f-3115 11/12h). The evident theory was that at the time the distilled spirits were withdrawn from the distillery or bonded warehouse, they should be classified

as for beverage, or for industrial, medicinal, etc., purposes, and the tax paid accordingly. It was at least difficult to apply this statute intelligently to 'moonshine' whisky, which never reached the contemplated point of withdrawal or classification; but then we come to section 600 of the Revenue Act of 1921 (42 Stats. 285 [Comp. St. Ann. Sup. 1923, §5986e]). This amended the last quoted statute by adding thereto: 'Provided, that on all distilled spirits on which tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon * * * to be paid by the person responsible for such diversion."

"Since the National Prohibition Act then forbade any diversion to beverage purposes or for use in an article intended for a beverage, here we have, perhaps for the first time, the clear imposition by Congress of a per-gallon tax on liquor involved in any forbidden transaction; but here, again, it seems most difficult to make application of the provision to moonshine liquor. Indeed, the amendment of 1921 cannot refer to such liquor, since the effect is confined to spirits on which the nonbeverage tax has been paid; and its apparent scope was limited to spirits which had been withdrawn for industrial or other lawful purpose and then were diverted; but even if it were otherwise applicable, we do not find in this record any charge that the persons who transported were the 'persons responsible' for the diverson. In any effort to invoke this amendment of 1921, we must observe that this illicit liquor is diverted to beverage purposes the moment it is made as much as it ever is until its use as a beverage is finally accomplished;

and it would hardly be thought that the ultimate consumer is the person intended to be taxed by the amendment of 1921, or that his act is 'deposit or concealment' under R. S. §3450.

"Were it assumed that the distiller of moonshine wished to pay the per gallon tax thereon—whatever the amount might be, $2.20 or $6.40—he would have difficulty enough in doing so, though possibly the implications of R. S. §3253 would point the way; but if the later purchaser of the same liquor wished to make this payment, would he be able to discover any way in which it could be done? If he could have done it under the old revenue laws, it would have been by the purchase of stamps and affixing them to the package, though he was not entitled to buy stamps and practically he could not have done this; but, the National Prohibition Act, §35, after providing that the act shall not relieve any one from paying any taxes imposed upon the manufacture of such liquor or the traffic in it—a provision obviously intended to retain some liability on the part of the manufacturer and trafficker but reaching no one else—proceeds: 'No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance: * * *'" So far as we find, there was in the old revenue laws no way of paying any per gallon tax except to pay it by revenue stamps 'in advance' of the act which would make the liquor available for use; but now comes Section 35 and prohibits the issue of any revenue stamps or tax receipts in advance."

On page 32 of its brief, in Case No. 473, Garth Motor Company, Claimant, the Government does say that the reasoning and decision of the Circuit Court in the Commercial Credit Company case loses force when Section 600-a of the Revenue Act of 1918 is taken into consideration. (See also discussion, page 24, *supra.*)

There has been no excise tax law upon intoxicating liquors for beverage purposes enacted by Congress since the adoption of the Eighteenth Amendment, unless such laws can be found in Section 5 of the Supplemental Act of 1921, or in the Revenue Act of 1921, amending Section 600-a. Section 600-a of the Revenue Act of 1918 (Act of February 24, 1919) to which the Government refers, became a part of the body of our laws in 1919, immediately following the ratification, but before the going into effect, of the Eighteenth Amendment. (The Amendment was ratified on January 29, 1919, to be effective one year later.) The Government was within a year to be deprived of one of its largest sources of revenue, its excise tax on intoxicating liquors. During the remainder of the time such revenue was available to the Government, Congress therefore imposed by Section 600-a a tax of $2.20 on non-beverage liquor and a tax of $6.40 on beverage liquor. The tax therein provided was to be paid under the "provisions of existing law", which were to be found in Section 3251 Revised Statutes, as amended by Act of August 27, 1894, c. 349, Sec. 48, 28 Stat. 563, where it was provided that the Commissioner of Internal Revenue should furnish suitable stamps to denote the payment of the internal tax, and that the stamps should be affixed to all packages containing distilled spirits; with a further proviso, however, that the tax should be paid *on or before the removal from the distillery or place of storage* within eight years from the date of original entry for deposit in any distillery warehouse.

Section 600a of the Revenue Act of 1918 was a statute solely in respect to the taxation of intoxicating liquors legally produced and placed in bond. At the time of its

enactment (Feb. 24, 1919), distilled spirits could be *withdrawn* from bond for either beverage or non-beverage purpose and either for domestic sale or export. The production of distilled spirits for non-beverage purposes was permitted by law but the right to import distilled spirits had been suspended since prohibition of importation was immediately effective by the War Prohibition Act of Nov. 21, 1918 (Chap. 212, 40 Stat. 1045). The prohibition, however, against the sale of distilled spirits for beverage purposes under the War Prohibition Act did not become effective until July 1, 1919. The Lever Act of Aug. 10, 1917 (Chap. 53, 40 Stat. 276) did not prohibit the sale or use of distilled spirits for beverage purposes, as is admitted in the brief for the Government in case No. 473. Section 600a was enacted Feb. 24, 1919, and was effective the next day. Accordingly when 600a was effective and in force there was no prohibition against the sale or export or use of intoxicating liquor for beverage purpose and the brief for the Government, pages 19 to 23, where it states to the contrary is in error. This error and the confusion over the maze of effective dates of the various statutes cited in the Government brief led counsel for the Government into the fallacious deductions made from the holdings of this court in United States *v.* Stafoff (260 U. S. 477), and United States *v.* Yuginovitch (256 U. S. 450). The three cases cited by the Government all involved the collection from distillers of taxes at the non-beverage rate on liquor which had been in bond before June 30, 1919, but had been removed from bond after said date without payment of the non-beverage tax. Hamilton *v.* Kentucky Distilleries (C. C. A. 6) held the non-beverage rate and not the beverage rate was assessable on liquor stolen from the warehouse;

Maresca *v.* United States (C. C. A. 2), 277 Fed. 727 (certiorari denied 257 U. S. 657), held specifically at page 743 that there was only a tax for non-beverages and not for beverage liquor under Section 600a; Goldberg *v.* United States (C. C. A. 5), 280 Fed. 89, considered Revised Statute 3244 which covered both beverage and non-beverage liquor but the court said the beverage rate was not the issue.

The decisions in all three cases are sound but do not support the contention of the Government. The non-beverage tax has remained in effect. Section 600b of the Revenue Act of 1918 suspended the beverage but not the non-beverage tax.

With the War Prohibition Act and the Eighteenth Amendment both in mind, and recognizing that intoxicating liquor for beverage purposes would soon be a thing of the past insofar as revenue was concerned, Congress adopted Section 600-b of the Revenue Act of 1918 in its enactment of February 24, 1919, in which it provided that the tax imposed by Section 600-a should not be due or payable on spirits while stored in any distillery, bonded warehouse, or special or general bonded warehouse, and which pursuant to any act of Congress or proclamation of the President cannot be lawfully sold or removed.

Congress further, in order to enforce the Eighteenth Amendment, on October 28, 1919, passed the National Prohibition Act (Chapter 85, 41 Stat. 305) and in that Act Congress went one step further by Section 35 thereof, which prohibited and forbade the issue and advance of any revenue stamps, and followed with certain penalties for the illegal manufacture of liquor. Again on November 23, 1921, in the act referred to as the Revenue Act of 1921

(42 Stat. 285), Congress further recognized that by reason of Section 600-b of the Revenue Act of 1918, a tax on beverage liquor had been suspended and that because of the National Prohibition Act there could be no tax under Section 600-a on intoxicating liquor for beverage purposes; that intoxicating liquor could no longer be *withdrawn,* as term was meant in Section 600a, for beverage purposes; that as a result persons who were in lawful possession of non-beverage liquor might *divert* such liquor for beverage purposes, without being liable for an additional tax. Therefore, to make certain that the Government received in addition to the penalties already provided a further penalty that would be equal to the tax previously provided for in Section 600-a before the adoption of the National Prohibition Act, Congress amended Section 600-a by the Act of November 23, 1921 (Chap. 136, 42 Stat. 227, 285), and made the person responsible for the *diversion* of the liquor from non-beverage to beverage purposes subject to a further penalty (called a tax) of $4.20 per gallon over and above the non-beverage rate of $2.20 per gallon which had already been paid. The tax for legal withdrawal was no more; the penalty for illegal diversion had taken its place.

As was pointed out in Commercial Credit Company *v.* United States, 5 Fed. (2) 1, the mere consumer or transporter of the liquor cannot be considered as the one responsible for diverting the liquor from non-beverage to beverage purposes, and even with greater force can it be said that he does not come within the provisions of the amendment to Section 600-a, when the liquor he is transporting or consuming is illicit moonshine liquor, always intended for beverage purposes, and therefore not subject

to being diverted from non-beverage purposes. In any event the tax, as will be argued at length under Point 5 of this brief, was in fact a penalty and not a true tax, and "the requirement of Section 3450 that there shall be an intent to defraud of a tax cannot be satisfied by finding no tax but only a penalty" (Commercial Credit Company *v.* United States, 5 Fed. (2) 1).

5.

PENALTIES AGAINST INNOCENT PARTIES ARE VOID.

Taxes on beverage liquors are penalties, and to enforce penalties against acknowledged innocent parties by arbitrary forfeiture of their property rights is a violation of the Fifth Amendment.

It must be accepted as settled law, since the decision of United States *v.* Yuginovich, 256 U. S. 462, that Congress may, under the broad authority of the taxing powers, tax intoxicating liquors notwithstanding their production is prohibited by the Federal Constitution. The nature of that tax, however, is not defined in the Yuginovich case, and its definition becomes important, as to the rights of innocent third parties in the automobiles used in transporting untax paid beverage liquor, because of the decision of this court in Goldsmith-Grant Company *v.* United States, 254 U. S. 505.

It is a fact that prior to the National Prohibition Act the taxing statutes on intoxicating liquor were for revenue, nevertheless their nature and character changed upon the adoption of national prohibition. The Circuit Court of

Appeals for the Fifth Circuit discusses Section 3450 from this angle in Fontenot *v.* Accardo, 278 Fed. 871):

> "The Act of Congress, passed to enforce the Eighteenth Amendment, is a highly penal statute. It is not a revenue measure. Whatever charges still remain upon prohibited beverage liquor, are imposed for preventing the manufacture and sale thereof. Many provisions of the old laws which had proved useful in protecting revenue, can be used effectively in preventing violations of the prohibitory act, and hence we find that Section 35 repeals the Revenue Laws only insofar as they are inconsistent with the provisions of the Act; *but the purpose of the old provisions changed upon their adoption by the new Act, so that the laws originally intended to protect revenue, by the change became laws in aid of prohibition*" (italics ours).

United States *v.* 2,000 cases of whiskey (C. C. A. 2), 277 Fed. 410;

United States *v.* American Brewing Co. (Pa.) 296 Fed. 772.

To regard the tax other than in the nature of a penalty is to impute to Congress an unconscionable and immoral intention in reenacting the taxing statute by the Supplemental Act of 1921. If Congress intended that this should be regarded as taxation in its true nature, then it proposes that the Government shall profit by the human frailties of its own citizens, and that national prosperity shall be built in proportion to national criminal degeneracy. Can it be said that Congress anticipated that the violation of the national mandate against intoxicating liquor would be profitable to the Treasury through the payment of taxes? Such an intention it is unfair to impute to Congress.

This court has never hesitated to strip a penalty of its disguise as a tax.

Child Labor Tax Case, 259 U. S. 20;
Hill *v.* Wallace, 259 U. S. 44;
St. Louis Cotton Compress Company *v.* Arkansas, 260 U. S. 346;
Helwig *v.* United States, 188 U. S. 605.

In those cases where the objections urged against the tax were that it was *excessive* to the point of being prohibitive, this court has rightly said that under such circumstances the redress was through Congress. (See Child Labor Tax Case, 259 U. S. 20.) Where on the other hand, an attempt has been made to inflict a punishment by a tax for having done a prohibited act, the tax has been regarded as a penalty. In Helwig *v.* United States, 188 U. S. 605, the court said at p. 611:

> "Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character."

And this court said in O'Sullivan *v.* Felix, 233 U. S. 318, at 324:

> "The term 'penalty' involves the idea of punishment for the infraction of a law, and is commonly used as including any extraordinary liability to which the law subjects a wrong-doer * * *."

In Lipke *vs.* Lederer, 259 U. S. 557, this court again said at page 561:

> "The mere use of the word 'tax' in an Act primarily designed to define and suppress crime is not

> enough to show that within the true intendment of the term a tax was laid. . . . . When by its very nature the imposition is a penalty, it must be so regarded. . . . . It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the Government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty."

See also Regal Drug Co. *vs.* Wardell, 260 U. S. 386.

The so-called tax upon beverage liquor must be regarded as a punishment, since beverage liquor is prohibited both by the Constitution and statutory law.

> U. S. *v.* 2000 Cases of Whiskey (C. C. A. 2) 277 Fed. 410;
>
> One Ford Touring *v.* United States (C. C. A. 8) 284 Fed. 823;
>
> United States v. American Brewing Co., (Pa., 2 Judges) 296 Fed. 772.
>
> United States *v.* 2615 Barrels of Beer (M. D. Pa.)—1 Fed. (2) 500.

Such a penalty enforced against innocent third parties by forfeiture under Section 3450 of their property rights in automobiles transporting or possessing untax paid beverage liquor is a denial of the guaranties given to them under the Fifth Amendment to the Federal Constitution. (Lipke *v.* Lederer, 259 U. S. 557); and that Congress did not intend to violate said constitutional guaranties by the enactment of the Supplemental Act of 1921 is apparent, because Congress had, under the National Prohibition Act, erected its own machinery under Section 26 of that Act, to accomplish the desired results without doing violence to the property rights of innocent third parties.

Conclusion.

It is submitted, therefore, that in respect to the forfeiture of the property rights of innocent parties in automobiles used in transporting or possessing untax paid beverage liquor, that Section 3450 was repealed by the National Prohibition Act, and that it was not re-enacted by the Supplemental Act of 1921; that persons in charge of the automobiles in question were not liable for a tax or intending to defraud the Government of the same, and were not using the automobile within the meaning of Section 3450, and that their arrest under the National Prohibition Act made it mandatory that proceedings against the automobile must be brought under the National Prohibition Act and not Section 3450; that there is no tax on illicitly made beverage liquor, and in fact so-called taxes are penalties and cannot be enforced against innocent parties without violating the Fifth Amendment of the Constitution; and that Section 3450 is not now available to the Government to secure the forfeiture of the automobiles under the circumstances in these cases. The decree of the United States Circuit Court for the Fifth Circuit in Case No. 473 (Garth Motor Company, Claimant) sustaining the order of the District Court in quashing the libel, should therefore be affirmed. The questions certified to this court by the United States Circuit Court for the Ninth Circuit in Case No. 611 (Port Gardner Investment Company *v.* United States) should be answered as follows:

Question No. 1. Answer, no. If question is considered too broad should be answered no in respect to persons

other than distillers or persons diverting liquor from non-beverage to beverage purposes.

Question No. 2. Answer, no.
Question No. 3. Answer, no.
Question No. 4. Answer, no.
Question No. 5. Answer, yes.
Question No. 6. The so-called taxes are penalties.

Respectfully,

DUANE R. DILLS,
Counsel,

Garth Motor Co., Claimant, Case No. 473.
Port Gardner Investment Co., Case No. 611.

WILLIAM S. PRITCHARD,
of Birmingham, Ala.

JOHN W. CREEKMUR,
of Chicago, Ill.

PHILLIP W. HABERMAN.

FRANK H. TOWSLEY,
of New York City.

Of counsel in Case No. 473,
Garth Motor Co., Claimant.

LOREN GRINSTEAD,

WILLIAM T. LAUBE,

JAMES A. LAUGHLIN,
of Seattle, Wash.

THOMAS E. DAVIS,
of Portland, Ore.

Of counsel in Case No. 611,
Port Gardner Investment Co.

APPENDIX.

For the convenience of the Court the following statutes are set forth below:

NATIONAL PROHIBITION ACT, TITLE II.

Chap. 85, Act Oct. 28, 1919; 41 Stat., L. 305, 315.

SEC. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the

lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

41 Stat. L. 305, 317.

SEC. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the

manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

SUPPLEMENTAL ACT OF 1921.

Chap. 34, Act. Nov. 23, 1921, 42 Stat. L. 222, 223, sometimes called the Willis Campbell Act.

SEC. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result

of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act."

REVISED STATUTES.

Sec. 3450 of the Revised Statutes. (Removing and concealing articles with intent to defraud United States of tax—forfeiture and penalty.) Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof

any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

REVENUE ACT 1918.

Act of Feb. 24, 1919, c. 18; 40 Stat. at L. 1057, 1105.

SEC. 600 (a) (DISTILLED SPIRITS—AMOUNT OF TAX—WHEN DUE.) That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. (40 Stat. L. 1105.)

SEC. 600 (b) (SPIRITS IN STORAGE—PAYMENT OF TAX AS AFFECTED BY PROHIBITION BAN—WITHDRAWAL OF SPIRITS—LEAKAGE, ETC.—IMPORTED SPIRITS, WINES OR OTHER LIQUOR.) That the tax imposed by subdivision (a) on distilled spirits intended for beverage purposes shall not be due or payable on such spirits while stored in any distillery, bonded warehouse, or special or general bonded warehouse, and which, pursuant to any Act of Congress or proclamation of the President of the United States, cannot be lawfully sold or removed from any such warehouse during the period of prohibition fixed by such Act or proclamation; * * *.

REVENUE ACT 1921.

Act Nov. 23, 1921, Chap. 136, §600; 42 Stat. L. 285.

Sec. 600. That subdivision (a) of Section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following: "*Provided*, That on all distilled spirits on which tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion.

ACT OF MARCH 3, 1897.

29 Stat. L. 626.

CHAPTER 379. An Act to allow the bottling of distilled spirits in bond.

Be it enacted * * * That whenever any distilled spirits deposited in the warehouse of a distillery having a surveyed daily capacity of not less than twenty bushels of grain which capacity or not less than twenty bushels

thereof is commonly used by the distiller, have been duly entered for withdrawal upon payment of tax, or for export in bond, and have been gauged and the required marks, brands, and tax-paid stamps or export stamps, as the case may be, have been affixed to the package or packages containing the same, the distiller or owner of said distilled spirits, if he has declared his purpose so to do in the entry for withdrawal, which entry for bottling purposes may be made by the owner as well as the distiller, may remove such spirits to a separate portion of said warehouse which shall be set apart and used exclusively for that purpose, and there, under the supervision of a United States storekeeper, or storekeeper and gauger, in charge of such warehouse, may immediately draw off such spirits, bottle, pack and case the same; Provided, That for convenience in such process any number of packages of spirits of the same kind, differing only in proof, but produced at the same distillery by the same distiller, may be mingled together in a cistern provided for that purpose, but nothing herein shall authorize or permit any mingling of different products, or of the same products of different distilling seasons, or the addition or the subtraction of any substance or material or the application of any method or process to alter or change in any way the original condition or character of the product except as herein authorized; nor shall there be at the same time in the bottling room of any bonded warehouse any spirits entered for withdrawal upon payment of the tax and any spirits entered for export; Provided also, That under such regulations and limitations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the provisions of this Act may be made to apply to the bottling and casing of fruit brandy in special bonded warehouses.

Every bottle when filled shall have affixed thereto and passing over the mouth of the same such suitable adhesive engraved strip stamp as may be prescribed, as hereinafter provided, and shall be packed into cases to contain six

bottles or multiples thereof, and in the aggregate not less than two nor more than five gallons in each case, which shall be immediately removed from the distillery premises. Each of such cases shall have affixed thereto a stamp denoting the number of gallons therein contained, such stamp to be affixed to the case before its removal from the warehouse, and such stamps shall have a cash value of ten cents each, and shall be charged at that rate to the collector to whom issued, and shall be paid for at that rate by the distiller or owner using the same.

And there shall be plainly burned on the side of each case, to be known as the Government side, the proof of the spirits, the registered distillery number, the state and district in which the distillery is located, the real name of the actual bona fide distiller, the year and distilling season, whether spring or fall, of original inspection or entry into bond, and the date of bottling, and the same wording shall be placed upon the adhesive engraved strip stamp over the mouth of the bottle. It being understood that the spring season shall include the months from January to July, and the fall season the months from July to January. And no trade marks shall be put upon any bottle unless the real name of the actual bona fide distiller shall also be placed conspicuously on said bottle.

War Prohibition Act.

Chapter 212, 40 Stat. L. 1045.

Act of November 21, 1918, entitled "An Act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products' and for other purposes."

Be it enacted * * * Fourth * * * That after June thirtieth, nineteen hundred and nineteen, until the conclu-

sion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization; Provided, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

ACT OF AUGUST 27, 1894.

28 Stat. at L. 509 at 563.

SEC. 48. That on and after the passage of this Act there shall be levied and collected on all distilled spirits in bond at that time, or that have been or that may be then or thereafter produced in the United States, on which the tax is not paid before that day, a tax of one dollar and ten cents on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon: Provided, That in computing the tax on any package of spirits all fractional parts of a gallon, less than one tenth, shall be excluded.

The Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, shall prescribe and furnish suitable stamps denoting the payment of the internal revenue tax imposed by this section; and until such stamps are prepared and furnished, the stamps now used to denote the payment of the internal revenue tax on distilled spirits shall be affixed to all packages containing distilled spirits on which the tax imposed by this section is paid; and the Commissioner of Internal Revenue shall, by assessment or otherwise, cause to be collected the tax on any fractional gallon contained in each of such packages as ascertained by the original gauge, or regauge when made, before or at the time of removal of such packages from warehouse or other place of storage; and all provisions of existing laws relating to stamps denoting the payment of internal revenue tax on distilled spirits, so far as applicable, are hereby extended to the stamps provided for in this section.

That the tax herein imposed shall be paid by the distiller of the spirits, on or before their removal from the distillery or place of storage, except in case the removal therefrom without payment of tax is authorized by law; and (upon spirits lawfully deposited in any distillery warehouse, or other bonded warehouse, established under in-

ternal revenue laws) within eight years from the date of the original entry for deposit in any distillery warehouse, or from the date of original gauge of fruit brandy deposited in special-bonded warehouse, except in case of withdrawal therefrom without payment of tax as authorized by law.